S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

SHERRIE LUMM, Plaintiff-Appellant,	UNPUBLISHED February 9, 2006
v	No. 256792 Court of Claims
DEPARTMENT OF TRANSPORTATION, Defendant-Appellee.	LC No. 03-000170-MD

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition to defendant under MCR 2.116(C)(7) and ruling that plaintiff's failure to meet the notice requirements of MCL 691.1404 had prejudiced defendant. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

Plaintiff alleges that on November 24, 2001, she was driving northbound on I-75 in Roscommon County when she came upon standing water on the road surface that caused her car to hydroplane. Her car then slid sideways into the median and flipped over about six times before finally hitting a tree. Plaintiff alleges that ruts in the road surface had caused the standing water to accumulate. As a result of the accident, plaintiff suffered disabling injuries to her back, left shoulder and elbow. Plaintiff also suffered a closed head injury and depression, which prevented her from returning to work as a registered nurse. Since the accident, plaintiff has had diminished short-term memory, processes information slowly, and has difficulty making decisions.

Plaintiff met with an attorney in October 2002 to apply for social security disability benefits. After meeting with the attorney, plaintiff first considered making a claim due to the condition of the road. On December 23, 2002, plaintiff sent a "Notice of Claim" and Freedom of Information Act request to the Director of the Michigan Department of Transportation (MDOT) and to the MDOT Office of Communication. However, plaintiff did not file the notice in triplicate with the clerk of the court of claims as required by MCL 691.1404(2). Plaintiff filed her complaint on October 29, 2003. Defendant filed its answer in mid-December 2003, raising governmental immunity as an affirmative defense.

On March 17, 2004, the trial court signed a scheduling order stipulated to by both parties, which provided that MCR 2.116 motions must be filed and heard on or before March 31, 2004 and that the order could be amended only by permission from the court. However, on May 27, 2005, defendant filed its motion for summary disposition under MCR 2.116(C)(7), arguing that plaintiff's claim must be dismissed because plaintiff failed to file a notice with the clerk of the Court of Claims as required by MCL 691.1404(1), and the letter sent to MDOT on December 23, 2002 did not comply with subsections (1) and (2) of the statute and was also not filed within the 120-day notice provision.

To demonstrate that it had been prejudiced by plaintiff's failure to comply with the notice provisions of MCL 691.1404, defendant established that plaintiff had transferred title of her vehicle to her auto insurer on December 8, 2001. Defendant also alleged that sometime in May 2002, defendant finished resurfacing the road where the accident occurred. Plaintiff argued that summary disposition was improper because defendant's motion violated the scheduling order, and plaintiff suffered a close head injury in the accident that affected her mental capacity and that issue shall be determined by the trier of facts per MCL 691.1404(3). The trial court granted summary disposition for defendant, finding that plaintiff had failed to comply with the notice requirements of MCL 691.1404 and that defendant had been prejudiced by the lack of notice.

II. SCHEDULING ORDER

Plaintiff first argues that because defendant's summary disposition motion was filed after the deadline for such motions specified on the stipulated scheduling order, the trial court erred in hearing and deciding the motion. We disagree.

A. Standard of Review

The trial court's decision to rule on defendant's summary disposition motion despite the passage of the scheduling order deadline is reviewed for an abuse of discretion. See *EDI v Lear*, 469 Mich 1021; 678 NW2d 440 (2004); *People v Grove*, 455 Mich 439, 464; 566 NW2d 547 (1997).

B. Analysis

Here, plaintiff does not assert that the trial court would have abused its discretion in modifying the scheduling order if defendant had moved for such under MCR 2.401(B)(2)(c). More importantly, plaintiff offers no proof that she was somehow prejudiced by the trial court's decision to forgive the scheduling order violation and rule directly on defendant's motion for summary disposition. Absent evidence of some harm to plaintiff, we cannot say that the trial court's decision was "so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Schoensee v Bennett*, 228 Mich App 305, 314-315; 577 NW2d 915 (1998).

III. GOVERNMENTAL IMMUNITY NOTICE PROVISION

A. Standard of Review

This Court reviews de novo the trial's court grant of summary disposition based on governmental immunity under MCR 2.116(C)(7) to determine whether the governmental entity was entitled to judgment as a matter of law. *McDowell v Detroit*, 264 Mich App 337, 346; 690 NW2d 513 (2004). To avoid summary disposition under MCR 2.116(C)(7) based on governmental immunity, a plaintiff must allege facts justifying application of an exception to such immunity. *Tarlea v Crabtree*, 263 Mich App 80, 87; 687 NW2d 333 (2004). We consider all documentary evidence to determine if a suit is barred by governmental immunity and whether there is a material issue of fact. *Id*. at 87.; *Gilliam v Hi-Temp Products Inc*, 260 Mich App 98, 108-109; 677 NW2d 856 (2003). Summary disposition may be granted under MCR 2.116(C)(7) even for an issue of fact if, based on the evidence presented, reasonable minds could not differ. *Tarlea*, *supra* at 88.

B. Analysis

Plaintiff next argues that the trial court erred in finding that defendant was prejudiced by plaintiff's failure to comply with the notice requirement of MCL 691.1404. "When confronted with a motion for summary disposition based on governmental immunity, the burden is upon a plaintiff to plead facts in avoidance of immunity." *Michonski v Detroit*, 162 Mich App 485, 491; 413 NW2d 438 (1987). The scope of governmental immunity is construed broadly, while the exceptions to governmental immunity are construed narrowly. *Fane v Detroit Library Comm*, 465 Mich 68, 75; 631 NW2d 678 (2001). Before suing a state agency under the highway exception to governmental immunity, a plaintiff must comply with the notice provisions contained in MCL 691.1404. *Brown v Manistee Co Rd Comm'n*, 452 Mich 354, 358-359; 550 NW2d 215 (1996). This statute provides in pertinent part that notice of intent to sue based on defective road condition must generally be filed within 120 days after the date of injury, and notice must also be filed in triplicate with the clerk of the Court Of Claims during the notice period. MCL 691.1404(1, 2). Here, plaintiff's notice was not timely because it was sent 392 days after the incident and plaintiff never sent any notice to the clerk of the Court of Claims.

However, plaintiff argues that the 120-day notice provision of MCL 691.1404(1) should have been tolled because she was "incapable" of giving the requisite notice within the meaning of MCL 691.1404(3), which provides as follows:

> If the injured person is physically or mentally incapable of giving notice, he shall serve the notice required by subsection (1) not more than 180 days after the termination of the disability. In all civil actions in which the physical or mental capability of the person is in dispute, that issue shall be determined by the trier of the facts.

Plaintiff also claims that subsection (3) prohibited the court from resolving the issue in a summary disposition proceeding because the statute mandates that the issue of plaintiff's mental capability must be submitted to a jury.[1] However, we hold that the trial court could properly

[1] We note that the lower court record does not contain a jury demand, and the docket sheet does not show that a jury fee was paid. MCR 2.508 (D)(1) provides that "[a] party who fails to file a (continued…)

determine if there was a factual issue concerning whether plaintiff was "incapable" of giving notice within the meaning of MCL 691.1404(3). To illustrate, subsection (3) states that the trier of fact shall determine the issue when it is "in dispute," which presupposes a determination that the issue is "in dispute." *Id.* If there is a dispute, then the trier of fact would necessarily resolve it. Here, defendant never challenged plaintiff's evidence beyond claiming that the evidence did not support a finding that plaintiff was incapable of giving notice. Furthermore, a plaintiff suing the state has the burden of proving an exception to governmental immunity, *Michonski, supra* at 491, and a party opposing summary disposition may not base its opposition on unsupported speculation. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). Thus, the proper inquiry is whether plaintiff has presented evidence that would support a finding that she was incapable of giving the necessary notice.

Plaintiff has presented no evidence to support a finding that she was incapable of giving the required notice. Plaintiff has merely appended various medical evaluations and session notes from her therapist and insists that, in there somewhere, is proof that she was incapable of giving notice.[2] Notably absent from plaintiff's documentary evidence is an affidavit from a health care professional stating that plaintiff was incapable of giving the required notice. Plaintiff's own affidavit concedes that she had not even considered suing defendant until she met with a lawyer to discuss applying for disability benefits. Although the affidavit alleges that plaintiff suffered cognitive problems, it does not allege that she was incapable of filing the requisite notice.[3] Thus, plaintiff's own testimony suggests that she failed to file a claim during the requisite time period because she previously had not considered suing defendant for the injury. Moreover, having reviewed all of the medical documents and affidavits that plaintiff provided, we find nothing that would justify a trier of fact in finding that plaintiff was incapable of giving notice at any time. The evidence proffered by plaintiff could only invite a trier of fact to speculate. This is not a situation where further factual development would arguably help establish an issue of fact because whether plaintiff was incapable of giving the required notice would be based on evidence uniquely available to plaintiff. Accordingly even if the trial court erred in not addressing plaintiff's alleged incapability to give notice, any such error does not require reversal.

Plaintiff next argues that the trial court erred in finding that defendant was prejudiced by plaintiff's failure to comply with the notice requirements of MCL 691.1404. Failure to provide such notice does not does not automatically bar a suit against a state agency for a defective road condition unless the state agency has been prejudiced by the defective notice. *Brown, supra* at 366. Prejudice refers to a matter that prevents a party from having a fair trial, or a matter that a

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(…continued)

demand or pay the jury fee . . . waives trial by jury." Thus, plaintiff's claim that she was entitled to have a jury resolve the issue is without merit.

[2] Most of the appended documents are clearly irrelevant. For example, two separate documents are merely handwritten session notes from plaintiff's psychologist documenting that plaintiff called to cancel her appointments on those dates.

[3] Also, plaintiff never specifically alleged below that she was "incapable" of giving notice. Instead, she asserted that she suffered cognitive problems, cited MCL 691.1404(3), and claimed that her mental capability must be resolved by the trier or fact.

party cannot properly contest. *Blohm v Emmet Co Rd Comm*, 223 Mich App 383, 388; 565 NW2d 924 (1997).

Plaintiff claims that defendant was not prejudiced because even though the vehicle is missing and the road has been resurfaced, plaintiff has offered other evidence to establish the condition of both the car and the roadway. For example, plaintiff claims that she testified during deposition that she had never experienced problems with her tires before the accident nor had she had any prior episodes of hydroplaning. However, we find unconvincing a claim that a party is not prejudiced by lost evidence simply because the party may instead rely on the self-serving testimony of its opponent. Also, this Court found that defendant was prejudiced in *Blohm, supra* at 388-389, even though a video was available of the crash site taken just after the crash occurred, reasoning that loss of the vehicle was prejudicial because it prevented defendant from reconstructing the accident. In the instant case, not even a videotape of the car or the accident scene is available. Clearly, defendant was prejudiced by its inability to examine plaintiff's vehicle and its tires.

Plaintiff next claims that defendant was not prejudiced by the road having been resurfaced because it can rely on testimony from plaintiff's witness that ruts in the roadway had filled with water and caused plaintiff's vehicle to hydroplane. However, defendant is prejudiced given that it is impossible to contest that evidence. Potential rebuttal evidence is unavailable due to plaintiff's failure to comply with MCL 691.1404. *Blohm, supra* at 388.

Plaintiff also argues that she can establish that the road was rutted because of documents from defendant showing that other accidents occurred in the same area and that the road was rutted. Although defendant challenged admission of these documents based on 23 USC §§ 409 and 402(k)(1), plaintiff claims the trial court should have drawn an adverse inference against defendant for even objecting, citing M Civ JI 6.01 and *Barringer v Arnold*, 358 Mich 594; 101 NW2d 365 (1960). However, this issue is not properly presented for appellate review because it was not stated in plaintiff's statement of the questions presented. *People v Albers*, 258 Mich App 578, 584; 672 NW2d 336 (2003). Moreover, even putting aside the precedential value of jury instructions, we do not believe that objecting to the admissibility of evidence is analogous to "Failure to Produce Evidence or a Witness" under M Civ JI 6.01, nor is it analogous to a party failing to produce his mother as a witness, which occurred in *Barringer, supra* at 600-601. Finally, assuming the documents are admissible, neither the affidavit from plaintiff's witness nor the challenged documents remove the prejudice to defendant that occurred when it resurfaced the road without having the opportunity to measure the ruts prior to plaintiff filing the instant lawsuit. Like the video evidence in *Blohm*, the visual inspections of the road surface that supported the witness's affidavit and the challenged documents were "not done as part of an investigation to prepare for a lawsuit. [Similarly,] [h]ad defendant been timely put on notice, it could have hired experts to investigate the scene." *Blohm, supra* at 390. Thus, plaintiff's assertion that other available evidence removes the taint resulting from the lost evidence is without merit.

Affirmed.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Bill Schuette